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November 17, 2009

VIA HAND DELIVERY
Charles L.A. Terreni, Esquire
Chief Clerk of the Commission
SC Public Service Commission
P. O. Drawer 11649
Columbia, SC 29211

RE: Review of Avondale Mills, Incorporated's Rates
Approved in Order No. 2009-394
Docket No. 2009-342-WS

Dear Mr. Terreni:

As the record will reflect, this firm represents Avondale Mills, Inc. ("Avondale") in connection with the above docket pending before the South Carolina Public Service Commission ("Commission"). By correspondence dated November 6, 2009, the intervenors Michael Hunt and Joe A. Taylor requested the Commission to require Avondale to implement the new schedule of rates approved in Order No. 2009-394 no earlier than July 31, 2009, and to prohibit Avondale from taking steps to collect payments of rates set in Order No. 2009-394 for the period June 26, 2009, through July 25, 2009. For the reasons hereinafter set out, the intervenors' request should be denied.

The Commission issued Order No. 2009-394 June 18, 2009, granting Avondale a new schedule of rates and authorized Avondale to implement its new schedule of rates within 30 days of the date of that order or at the next billing cycle. Rather than bill its customers for service predating the issuance of Order No. 2009-394, Avondale chose to implement its new rate schedule in its next billing cycle for the period of June 26, 2009, through July 25, 2009 ("July bills"). The July bills were mailed to Avondale's customers on or about July 31, 2009.

Subsequently, the Aiken County Delegation petitioned the Commission to amend the rate schedule approved in Order No. 2009-394 and in response, the Commission opened the above docket August 12, 2009. Dissatisfied with the Commission's response to their petition, the Aiken County Delegation and intervenors herein thereafter obtained temporary injunctive relief from the Aiken County Court of Common Pleas restraining the implementation of the rates approved in Order No. 2009-394 because the Commission failed to cause notice of the approved rates to be published in a newspaper of general circulation. Michael Hunt et al v. Avondale Mills, Inc. and South Carolina Public Service Commission, CA No. 2009-CP-2-1898.

The Supreme Court has vacated the Circuit Court's injunction leaving the rates approved in Order No. 2009-394 in effect. A hearing was held in the above docket October 6, 2009, and briefs and proposed orders have been filed and served.

However, Avondale's customers clearly had notice of Avondale's rate increase. In Docket No. 2008-460-WS Avondale complied with the Commission directive that Avondale provide its customers actual and constructive notice of the rates requested. In addition, Avondale's customers had notice of a public hearing convened in Graniteville, South Carolina May 26, 2009 providing them an opportunity to express their concerns over the proposed rates. Last, Avondale's customers had notice of the hearing on Avondale's application June 2, 2009. By the time the Commission approved Avondale's rate request, Avondale's customers had ample notice of the expected rate increase and the opportunity or need to moderate their water usage.

The intervenors argue in their November 6, 2009, correspondence that Avondale's customers did not receive notice of the new schedule of rates until July 31, 2009, when the customers received their July bills. The intervenors argue that S.C. Code Ann. §58-5-260 required the Commission to publish notice of the rates approved in Order No. 2009-394 in a newspaper of general circulation in Aiken County before the new schedule of rates may become effective. However, §58-5-260 does not require the Commission to provide any notice of rates other than that required by §58-33-240. See the authority set out in the initial brief of the South Carolina Public Service Commission submitted to the South Carolina Supreme Court in Michael Hunt et al v. Avondale Mills, Inc. and South Carolina Public Service Commission enclosed. It is undisputed that Avondale's customers had actual notice that their rates would increase substantially. Avondale's customers had all the notice required by law.

Moreover, the intervenor's request to prohibit Avondale from collecting payments under the rates approved under Order 2009-394 must be denied. Any reduction in Avondale's rates must be prospective and may not be retroactive. South Carolina Electric and Gas Company v. Public Service Commission, 275 S.C. 487, 272 S.E. 2d 793 (1980). To prohibit or enjoin Avondale from collecting its July bills lawfully approved under Order No. 2009-394 would constitute retroactive rate making and is impermissible.

Among the largest water bills in July were the irrigation accounts of the intervenors who consumed tens of thousands of gallons of potable drinking water to irrigate their lawns and who now request the Commission to spare them from their excessive behavior. However, as can be seen from the exhibit filed by Avondale November 12, 2009, approximately 80% of Avondale's customers have paid their July bills. Implicit in the customer response to Avondale's billing is the acknowledgement that the rates approved in Order No. 2009-394 are reasonable and necessary to equip Avondale to comply with the terms set out in Order No. 2009-394.

In addition, this Commission lacks authority to prohibit or enjoin Avondale from complying with the provisions set out by law for collecting unpaid accounts. Avondale proposes to comply with all Commission orders and regulations concerning its rates and the collection of its rates. The Commission cannot single out Avondale by prohibiting it the ability to collect lawful rates by lawful means. Avondale is entitled to the same protections and remedies available to all other public utilities.

Avondale has taken all steps required of it to obtain the new rate schedule approved in Order No. 2009-394, to implement the rate schedule as authorized by Order No. 2009-394 and to address water loss and water pressure stabilization as urged on it by the Commission in Order No. 2009-394. Not only does Avondale have the obligation to meet Commission standards but also to meet the service requirements of the South Carolina Department of Health and Environmental Control ("DHEC"). In issuing Order No. 2009-394, the Commission recognized the necessity for Avondale to be financially secure. The Commission concluded that the rates it approved are necessary to ensure the economic viability of Avondale's system (Order No. 2009-394 at page 5). The Commission concluded further that it was in the best interests of both Avondale and its customers to allow Avondale to earn a reasonable operating margin to provide it the means to maintain its water and wastewater system and comply with DHEC and Commission standards (Order No. 2009-394 at page 7).

In an effort to maintain its systems and comply with DHEC and Commission standards and in reliance on the rates approved in Order No. 2009-394, Avondale has spent or expects to spend over $200,000 to upgrade its system to stem water loss and stabilize water pressure. However, the intervenors would have Avondale upgrade its water and sewer system but without the revenue necessary to complete the upgrades.

Avondale not only requires the rates approved in Order No. 2009-394 but also requires the certainty of regulatory treatment that it might expect from the Commission. Order No. 2009-394 approving Avondale's rates was issued June 18, 2009. Avondale immediately undertook in good faith to comply with the Commission's order. Avondale, and all South Carolina public utilities, are entitled to the expectation of reasonable, consistent regulatory treatment, free from arbitrary or capricious state oversight. The intervenors understood that their first rate increase in 29 years would mean substantially higher water and sewer rates. The intervenors had six months to prepare for higher rates but failed to moderate their consumption much less conserve. Reasonable, consistent regulation compels the decision to refuse intervenors' request to reduce Avondale's rates.

For the reasons hereinabove set out, Avondale Mills, Inc. submits that the intervenors' request of November 6, 2009, be denied.

Sincerely,

ELLIOTT & ELLIOTT, P.A.

Scott Elliott

SE/jcl
Enclosure
cc: Parties of record w/encl.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

The Honorable Doyet A. Early, III, Circuit Court Judge

Case No. 2009-CP-02-01898

Michael Hunt, Joe A. Taylor, A. Shane Massey, J. Roland Smith, and Tom Young, Jr., — Respondents,

v.

Avondale Mills, Inc. and South Carolina Public Service Commission, — Appellants.

INITIAL BRIEF OF APPELLANT SOUTH CAROLINA PUBLIC SERVICE COMMISSION

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STATEMENT OF ISSUES ON APPEAL

This case presents two primary issues on appeal. One involves the circuit court's subject matter jurisdiction over rate-setting cases, and the other involves the merits of the circuit court's determination that the Public Service Commission is required to provide additional public notice after it approves of a rate change pursuant to the statutory notice-and-hearing process:

1. Did the circuit court lack subject matter jurisdiction to enjoin the implementation of rates established by the Public Service Commission?

2. Did the circuit court misinterpret South Carolina Code § 58-5-260 when it required the Public Service Commission to provide additional notice of a rate change after completing the notice-and-hearing process for changing rates established in South Carolina Code § 58-5-240?

STATEMENT OF THE CASE

Avondale Mills, Inc. ("Avondale") is a water and wastewater utility that provides service in Aiken County, including portions of Graniteville and Vaucluse, South Carolina. On December 23, 2008, Avondale filed an application with the South Carolina Public Service Commission ("PSC") for approval of a new rate schedule pursuant to South Carolina Code § 58-5-240. At the time of the application, Avondale was operating its water and sewer system at an approximate loss of $475,952 per year. (PSC Order 2009-394, p. 4.) In accordance with South Carolina Code § 58-5-240(B), Avondale published notice of the proposed rate schedule in the *Aiken Standard* and sent actual notice to its customers via postage paid first-class mail on February 2, 2009. (Aff. April Hammond, Feb. 6, 2009.) A public hearing was held on May 26, 2009, in Graniteville, followed by a formal merits hearing before the PSC on June 2, 2009. After hearing the facts and evidence, the PSC issued its order on June 18, 2009, granting Avondale's proposed rate increase and authorizing Avondale to put its new rates into effect. (PSC

Order 2009-394, p. 10.) That same day, the PSC published the order on its publicly-accessible website, www.psc.sc.gov.

Avondale instituted the new rate schedule in its June 26–July 25, 2009 billing schedule. On July 31, 2009, Avondale's customers received their bills implementing the new rate schedule, along with an explanation of the rate increase. Subsequently, on August 13, 2009, Michael Hunt, Joe A. Taylor, Senator A. Shane Massey, Representative J. Roland Smith, and Representative Tom Young, Jr. (collectively "Respondents") filed a complaint for declaratory and injunctive relief, a motion for a temporary injunction, and a motion for a temporary restraining order in the Court of Common Pleas for Aiken County. On that same day, the circuit court granted an *ex parte* temporary restraining order and set the temporary injunction for hearing on August 19, 2009. (Temp. Restraining Order Aug. 13, 2009). Prior to the August 19th hearing, Respondents filed an amended complaint adding the PSC as a defendant in the case. (Amend. Compl.) The PSC, however, was not served until the day of that hearing, and did not make its first appearance in this matter until August 20th.

At the August 19th hearing, at which the PSC was not in attendance, Respondents' sole contention was that they did not receive proper notice under South Carolina Code § 58-5-260 of the PSC's decision to approve Avondale's proposed rate schedule. Therefore, in their view, Avondale should be enjoined from collecting payments under the new rates. (Mot. for Temp. Inj. Hr'g, pp. 7:13–8:8, 57:6–13.) Avondale, on the other hand, argued that South Carolina Code § 58-5-260 was inapplicable to the current facts because Avondale's rates were changed pursuant to the notice-and-hearing procedure outlined in South Carolina Code § 58-5-240. Alternatively,

Avondale argued that even if South Carolina Code § 58-5-260 was applicable here, the PSC fully satisfied this additional notice provision by posting the order changing Avondale's rates on its website. (Mot. for Temp. Inj. Hr'g pp. 34:15–37:25, 40:6–12, 65:12–20.) Therefore, Avondale argued that Respondents could not meet the required elements for injunctive relief.

Although the PSC took no position on the issuance of a preliminary injunction, it memorialized its position on the legal issues presented to the circuit court by letter dated August 20, 2009. In that correspondence, the PSC argued that the circuit court lacked subject matter jurisdiction over this case and that all notice required in a rate-setting case was properly provided here. (Letter from Joseph M. Melchers, Chief Counsel, Public Service Commission, to The Honorable Doyet A. Early, III (Aug. 20, 2009).)

On August 24, 2009—before the PSC filed any responsive pleading or appeared at any hearing—the circuit court granted a temporary injunction and enjoined Avondale from (1) collecting payment for its July 31, 2009 bills; (2) implementing the new rate schedule until notice is given to Respondents pursuant to South Carolina Code § 58-5-260; (3) terminating any customers' service; and (4) imposing late fees for failure to pay bills due on August 15, 2009. (Temp. Inj. Order p. 8.) On August 27, 2009, Avondale filed a Motion for Reconsideration and Clarification and a Motion for Supersedeas. The circuit court denied both motions.

On August 27, 2009, Avondale timely filed a notice of appeal pursuant to South Carolina Code § 14-3-330(4). Appellants received a copy of the transcript of the proceedings before the circuit court on September 18, 2009. Avondale filed its initial brief with this Court on October 8, 2009.

STANDARD OF REVIEW

I. SUBJECT MATTER JURISDICTION

Subject matter jurisdiction is the power of the Court to hear and decide a case. *Coon v. Coon*, 364 S.C. 563, 566, 616 S.E.2d 616, 617 (2005). "Lack of subject matter jurisdiction can be raised at any time, can be raised for the first time on appeal, and can be raised *sua sponte* by the court." *All Saints Parish v. Protestant Episcopal Church*, 358 S.C. 209, 238, 595 S.E.2d 253, 269 (Ct. App. 2004). Subject matter jurisdiction is a question of law for the Court and is decided without any deference to the lower court. *Doe v. Barnwell Sch. Dist. 45*, 369 S.C. 659, 661, 633 S.E.2d 518, 519 (Ct. App. 2006).

II. ERRORS OF LAW WHEN GRANTING INJUNCTIVE RELIEF

Under South Carolina law, a party is entitled to injunctive relief only when it can show three elements: irreparable harm, a likelihood of success on the merits, and an inadequate remedy at law. *See Scratch Golf Co. v. Dunes West Residential Golf Props., Inc.*, 361 S.C. 117, 121, 603 S.E.2d 905, 907–08 (2004). The decision to grant or deny an injunction "will not be overturned absent an abuse of discretion." *City of Columbia v. Pic-A-Flick Video, Inc.*, 340 S.C. 278, 282, 531 S.E.2d 581, 520 (2000). An abuse of discretion exists when the circuit court's decision is "controlled by an error of law." *Id.* at 282, 531 S.E.2d at 521. Thus, while the PSC did not take a position below with respect to the issuance of a temporary injunction as a procedural matter,[1] the main issue on an appeal of the merits of that order is whether the circuit court improperly interpreted

[1] The PSC informed the circuit court that it would argue against the jurisdiction of that court to hear this action and against Respondents' interpretation of South Carolina Code § 58-5-260 at the expected hearing on a permanent injunction. (Letter from Joseph M. Melchers, Chief Counsel, Public Service Commission, to The Honorable Doyet A. Early, III (Aug. 20, 2009).) This appeal, however, intervened.

South Carolina Code § 58-5-260 and, in turn, committed an error of law. For the reasons discussed below, the PSC contends that it did.[2]

ARGUMENTS AND AUTHORITIES

I. THE CIRCUIT COURT LACKED SUBJECT MATTER JURISDICTION TO HEAR A CASE THAT INVOLVES THE RATE-SETTING PROCESS FOR PUBLIC UTILITIES.

A. The circuit court was without authority to issue the challenged temporary injunction because it lacks subject matter jurisdiction over public utility rate cases.

Subject matter jurisdiction is defined as the power of the courts "to hear and determine cases of the general class to which the proceedings in question belong." *Dema v. Tenet Physician Servs.-Hilton Head, Inc.*, 383 S.C. 115, 120, 678 S.E.2d 430, 433 (2009). Whether subject matter jurisdiction exists in a given case depends upon the "authority granted to the courts by the constitution and laws of the state." *Atlanta Skin & Cancer Clinic, P.C. v. Hallmark Gen. Partners*, 320 S.C. 113, 121, 463 S.E.2d 600, 605 (1995). Under the South Carolina Constitution, the circuit court is granted "original jurisdiction in civil . . . cases, except those cases in which exclusive jurisdiction shall be given to inferior courts, and shall have such appellate jurisdiction as provided by law." S.C. Const. art. V, § 11. Here, the PSC has exclusive jurisdiction, in the first instance, to decide public utility rate cases. Additionally, final orders from the PSC are subject to direct appeal to the South Carolina Supreme Court or Court of Appeals, not to the circuit court. Accordingly, the circuit court was without subject matter jurisdiction over this controversy and, therefore, had no authority to issue the challenged temporary injunction.

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[2] Contemporaneously with the filing of this brief, the PSC has moved to dismiss the proceedings before the circuit court for the reasons discussed herein and in the PSC's August 20th letter to that court.

With respect to the initial review of public utility rates, the statutory scheme leaves no doubt that the General Assembly carefully carved decisions about rate-setting out of the circuit court's jurisdiction and vested this jurisdiction solely with the PSC.[3] By law, the circuit court is "vested with jurisdiction to hear and determine all questions, actions, and controversies, ***other than those involving public service companies for which specific procedures for review are provided in Title 58***, affecting boards, commissions, and agencies of this State." S.C. Code Ann. § 15-77-50 (Supp. 2008) (emphasis added). The explicit bar to the circuit court's exercise of jurisdiction here is reiterated in the PSC's own enabling statutes. Title 58 establishes primary jurisdiction over public utility rate cases with the PSC by vesting the agency "with power and ***jurisdiction*** to supervise and regulate the rates and service of every public utility in this State." *Id.* §§ 58-3-140, 58-5-210 (emphasis added). In addition, other sections of Title 58 provide that the PSC has "***jurisdiction*** to hear complaints regarding the reasonableness of any rate or charges that affect the general body of ratepayers." *Id.* § 58-5-270 (emphasis added). By operation of the State Constitution, Title 58's vesting of jurisdiction in the PSC necessarily removed it from the circuit court. *See* S.C. Const. art. V, § 11 (allowing the circuit courts to have original jurisdiction over matters "except those cases in which exclusive jurisdiction shall be given to inferior courts").

The prohibition on the circuit court's exercise of jurisdiction over public utility rate cases extends to appeals. Title 58, for instance, provides that "[a] decision of the

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[3] An administrative agency is created by the General Assembly to carry out specific purposes. *See State ex rel. Riley v. Martin*, 274 S.C. 106, 109, 262 S.E.2d 404, 405 (1980) ("The General Assembly has a right to . . . create such agencies of government as may be necessary" (quoting *Clarke v. S.C. Pub. Serv. Auth.*, 177 S.C. 427, 438–39, 181 S.E. 481, 485 (1935)). In this regard, the General Assembly may vest exclusive jurisdiction over certain matters in an administrative agency with expertise in those particular fields. *See Unisys Corp. v. S.C. Budget & Control Bd.*, 346 S.C. 158, 175–77, 551 S.E.2d 263, 272–73 (2001) (finding exclusive jurisdiction over a contract dispute between a governmental body and a contractor is vested, by statute, in the chief procurement officer).

commission may be reviewed by the Supreme Court or court of appeals as provided by statute . . . upon questions of both law and fact." S.C. Code Ann. § 58-5-340 (Supp. 2008). This jurisdictional limitation is repeated in the South Carolina Administrative Procedures Act, which states that appellate review of a final order from the PSC "is to the Supreme Court or the court of appeals," not to an administrative law court or the circuit court. *Id.* § 1-23-600(D). This Court's rules echo the absence of appellate jurisdiction within the circuit-court system over decisions of the PSC. *See* Rule 203(d)(2)(A), SCACR (stating that "[a]ppeals from a decision of the Public Service Commission setting public utility rates pursuant to Title 58 of the South Carolina Code of Laws shall be filed with the Clerk of the Supreme Court"); *see also* S.C. Code Ann. § 15-77-50 (Supp. 2008) (barring circuit courts from exercising jurisdiction over cases involving rate-setting).

In light of the State Constitution, the State Code, and the Appellate Court Rules, there can be no doubt that the General Assembly unambiguously vested subject matter jurisdiction over all matters involving public utility rates to the PSC and, in turn, deprived the circuit court of the same. Because the underlying dispute involves the rate-setting process under Title 58—to be sure, the circuit court declared that "[t]he only issue before this Court is the issue of notice under S.C. Code § ***58***-5-260" (Temp. Inj. Order p. 4 (emphasis added))—the circuit court lacked subject matter jurisdiction to grant the challenged temporary injunction. Its decision to enjoin the implementation of Avondale's approved rate schedule is therefore void and should be vacated accordingly. *See McCullough v. McCullough*, 242 S.C. 108, 112, 130 S.E.2d 77, 79 (1963) ("It is a universal principle as old as the law, that the proceedings of a court without jurisdiction

are a nullity, and its judgment without effect." (quoting *Ex parte Hart*, 186 S.C. 125, 133, 195 S.E. 253, 256–57 (1938))).

B. Respondents have not exhausted their administrative remedies as required by law.

Even if circuit courts could exercise jurisdiction over cases involving rate-setting, it was improper for the circuit court to do so here because Respondents never exhausted their statutorily-prescribed administrative remedies. The doctrine of exhaustion provides that, as a general rule, a party must pursue and exhaust all available administrative remedies before seeking recourse in a court. *See, e.g., Law v. S.C. Dep't of Corr.*, 368 S.C. 424, 438, 629 S.E.2d 642, 650 (2006) (reminding that "administrative remedies must be exhausted absent circumstances excusing application"); *Hyde v. S.C. Dept. of Mental Health*, 314 S.C. 207, 208, 442 S.E.2d 582, 583 (1994) (stating that "administrative remedies must be exhausted absent circumstances supporting an exception"). Requiring a party to first exhaust its administrative remedies "avoid[s] interference with the orderly performance of administrative functions" and relieves the court system from being prematurely burdened with cases. *Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 100, 674 S.E.2d 524, 529 (Ct. App. 2009) (quoting *Ward v. State*, 343 S.C. 14, 19 n.7, 538 S.E.2d 245, 247 n.7 (2000)).

Although requiring exhaustion is often considered in the circuit court's discretion, this is not so when a statute gives an agency exclusive jurisdiction over subject matter. *See, e.g., Unisys*, 346 S.C. at 176, 551 S.E.2d at 273 (finding South Carolina Code § 11-35-4230(1) provided the "exclusive means" of resolving disputes between contractors and the State and thus Unisys was "required to exhaust its administrative remedies as a matter of law"); *S. Ry. Co. v. Order of Ry. Conductors*, 210 S.C. 121, 130–31, 41 S.E.2d

774, 777 (1974) (precluding original resort to the courts where "based upon statutes which by express terms or necessary implication gave to the administrative board exclusive jurisdiction"). Here, the circuit court committed reversible error by stating that Respondents had exhausted their administrative remedies when, in fact, they had not.

In its August 24, 2009 order, the circuit court stated, without explanation, that "Plaintiffs have exhausted their administrative remedies and have no other option than to pursue this action in the Circuit Court for both declaratory and injunctive relief." (Temp. Inj. Order p. 7.) This is not so. On August 3, 2009, and again on August 4, 2009, Respondents Massey, Smith, and Young petitioned the PSC to revisit its decision regarding Avondale's rates pursuant to South Carolina Code §§ 58-5-270 and 58-5-320. Those proceedings are still ongoing, and they were specifically brought to the circuit court's attention:

> MR. ELLIOTT: . . . There is an administrative proceeding pending in the Public Service Commission where this issue and any other issue may yet be raised. And so the proper forum is still the administrative –
>
> THE COURT: What is pending now in the Commission?
>
> MR. ELLIOTT: There is a complaint, it's in the nature of a complaint pending where the Commission has taken the August 3rd and 4th letters submitted by the Aiken County Delegation and ordered a hearing to consider the allegations raised . . . . So the administrati[ve] action is pending in the Public Service [Commission], or the issues are still pending.

(Mot. for Temp. Inj. Hr'g, pp. 43:14–44:5.)

Importantly, in both their August 3rd and August 4th requests to review Avondale's new rate schedule, these Respondents never raised any concerns stemming from South Carolina Code § 58-5-260, which was the sole statutory provision on which the circuit court based its decision. *See* Letter from Aiken County Legislative Delegation

to Charles L.A. Terreni, Chief Clerk and Administrator, Public Service Commission, in PSC Docket No. 2008-460-WS (Aug. 3, 2009) (failing to address or raise issue of notice under Section 58-5-260), *available at* http://dms.psc.sc.gov/matters/matters.cfc?Method=MatterDetail&MatterID=218294 (added to the PSC docketing database on August 3, 2009); Letter from Aiken County Legislative Delegation to Charles L.A. Terreni in PSC Docket No. 2009-342-WS (Aug. 4, 2009) (same), *available at* http://dms.psc.sc.gov/matters/matters.cfc?Method=MatterDetail&MatterID=218567 (added to the PSC docketing database on August 13, 2009). But even once those proceedings conclude, the circuit court will not have any jurisdiction over this case. *See, e.g.*, S.C. Code Ann. § 58-5-340 (Supp. 2008) (vesting appellate jurisdiction over PSC decisions in this Court and the Court of Appeals).

Additionally, none of these Respondents attempted to intervene in the proceedings before the PSC. Title 58 provides a detailed process for establishing public-utility rates. Included within this procedure is a provision that allows any party who is adversely affected by the PSC's decision to seek a rehearing before the agency. *See* S.C. Code Ann. § 58-5-330 ("Within twenty days after an order or decision is made by the commission, any party to the action or proceeding may apply for a rehearing as to any matter determined in the action or proceeding and specified in the application for rehearing and a rehearing must be granted if in the judgment of the commission sufficient reason exists."). Critically, the General Assembly prescribed that seeking a rehearing is a prerequisite to appealing the agency's decision to a court:

> No right of appeal arising out of an order or decision of the commission accrues in any court to any corporation or person ***unless*** the corporation or person makes application to the commission for a rehearing within the time specified.

Id. (emphasis added). By its clear terms, South Carolina Code § 58-5-330 requires "exhaustion of administrative remedies as a condition precedent to judicial action." *See Southern Railway*, 210 S.C. at 130–31, 41 S.E.2d at 777 (finding statutes making exhaustion a condition precedent to judicial action a form of statutorily-mandated exhaustion).

Although Respondents Hunt and Taylor, like any of Avondale's customers, could have intervened and become parties to the PSC's earlier proceedings, they chose not to do so. They should therefore be precluded from now asking a court to review that decision or the agency's procedures for implementing the new rates. Because there can be no legitimate dispute that Respondents have not exhausted their administrative remedies, the circuit court erred as a matter of law by exercising jurisdiction over this matter.

II. APPELLANTS COMPLIED WITH ALL APPLICABLE LAW WHEN APPROVING AVONDALE'S PROPOSED RATE SCHEDULE.

A. Appellants fully complied with all of the procedures outlined in South Carolina Code § 58-5-240 for approving schedules of proposed rate changes, including the statutory notice provisions.

In addition to being an invalid exercise of subject matter jurisdiction, the circuit court's ruling should be reversed because all statutorily-prescribed procedures were followed in Avondale's rate case. When a public utility company seeks to put a new rate schedule into effect, it must give thirty days' notice of its intention and, upon expiration of the thirty-day period, file the proposed rate schedule with the PSC. S.C. Code Ann. § 58-5-240(A) (Supp. 2008). After the utility files its proposed rate schedule, notice of the proposed rates must be provided to the public and the PSC must "hold a public

hearing concerning the lawfulness or reasonableness of the proposed changes." *Id.* § 58-5-240(B); *see also* S.C. Code Ann. Regs. 103-817(C)(3)(a) (discussing methods for placing the public on notice of proceedings pending before the PSC). Within six months of filing by the utility, the PSC must approve or reject the proposed changes. S.C. Code Ann. § 58-5-240(C) (Supp. 2008).

There is no dispute that these procedures were followed here. As noted in the circuit court's order granting the temporary injunction, Avondale applied for a new rate schedule under Section 58-5-240(A) from the PSC on December 23, 2008. (Temp. Inj. Order p. 2.) After the application was filed, the PSC required Avondale to comply with the notice provision of Section 58-5-240(B) by publishing notice of the proposed rate schedule in the *Aiken Standard* and by mailing actual notice of the proposed changes to its customers. (*Id.*) As discussed above, the PSC held two public hearings prior to approving Avondale's proposed rate change: the first was on May 26, 2009, in Graniteville, and the second was on June 2, 2009 in Columbia. The PSC's order approving Avondale's rate change was issued on June 18, 2009, and was posted on the agency's website that same day.[4] Accordingly, all of the requisite procedures in South Carolina Code Section 58-5-240—including its notice provision—were followed in this case.

B. No additional notice is required under South Carolina Code § 58-5-260 before Avondale's new rates become effective.

In order to sidestep this straightforward conclusion, the circuit court held that an additional notice provision, found in South Carolina Code § 58-5-260, was applicable to Avondale's rate change, but that the PSC failed to comply with this requirement by not

[4] See http://dms.psc.sc.gov/orders/orders.cfc?Method=OrderDetail&OrderID=179531 for a copy of this order and a summary of its filing history.

sending out an additional notice ***after*** the rate change was approved by the Commission. This finding by the circuit court was in error, however, as Section 58-5-260 is inapplicable since rates are changed pursuant to the notice-and-hearing process found in Section 58-5-240. But even if Section 58-5-260 is generally applicable in cases such as Avondale's, the circuit court's interpretation of the section is contrary to its plain meaning and intent. Each of these positions is discussed below.

1. South Carolina Code § 58-5-240's notice-and-hearing process for changing rates implicitly repealed South Carolina Code § 58-5-260.

As explained above, South Carolina Code §§ 58-5-240(A) through (C) provide a notice-and-hearing procedure for setting of new rates. Under these statutory provisions, a public utility's rates cannot be changed without the public being made aware of the possible change, a merits hearing being held on the proposed change, and Commission approval of the change. Avondale and the PSC meticulously followed this statutory procedure here.

South Carolina has not always followed this model for setting rates. In fact, prior to 1983, a utility's rates could be changed without a hearing or vote of the Commission. As described below, the notice provision contained in South Carolina Code § 58-5-260 was a component of the pre-1983 procedure for setting rates. Since 1983, the PSC has required a hearing and an affirmative vote of the Commission before rates could be changed pursuant to the notice provisions of South Carolina Code §§ 58-5-240(B) and (C). In light of the 1983 amendments to Section 58-5-240, the notice provisions of Section 58-5-260 were rendered obsolete. An examination of the pertinent statutory history confirms this interpretation:

- **Act No. 525 of 1922 Established a "Presumptively Valid" Process for Changing Rates**

In 1922, the South Carolina General Assembly ratified Act No. 525, which greatly enlarged the PSC's powers, duties, and jurisdiction. *See generally* Act No. 525 of March 24, 1922, *reprinted in Acts and Joint Resolutions of the General Assembly of the State of South Carolina Passed at the Regular Session of 1922*, at 938–43 (Thomas Cooper ed., 1921–22). Under that Act, a utility company could file a new rate schedule with the Railroad Commission—the PSC's predecessor—not less than thirty days prior to the schedule's effective date. This statutory scheme presumed that new rate schedules were valid, and they would go into effect without any hearing or public involvement unless the agency specifically disapproved of them. *See id.* at 941–42 (providing that "[i]n the absence of suspension or disapproval by the Commission . . . the new rate . . . embodied in any such new rate schedule shall become effective at the time specified in the schedule"). If the PSC disapproved of a presumptively-valid rate schedule, it had the discretion to "suspend the operation of the new schedule for a period not exceeding sixty (60) days." *Id.* at 942–43. During this period of suspension, the utility company was entitled to put its proposed rate schedule into effect by posting "a satisfactory bond, or by making other arrangements satisfactory to the Commission for the protection, during such period of suspension of the parties interested." *Id.* at 943.

Because this statutory scheme for changing rates involved information being transferred between only the utility and the PSC, the last sentence of Section 1 of Act No. 525 required the PSC to alert the public when rates were subject to being changed: "Within ten (10) days after the filing of any new or changed schedule by a public utility, the Commission shall given general notice thereof by publication." *Id.* This process was

the ***only*** means by which the public would receive notice of a new or changed rate schedule, as the law did not require a public hearing to challenge proposed rates before their implementation.

- **Relevant Language Remained Unchanged During Statutory Renumbering in 1932 and 1942**

The relevant language from Act No. 525 was mirrored in Section 8254 of the Civil Code of 1932, and again in Section 8211 of the Civil Code of 1942. *See generally* S.C. Code § 8254(*i*) (Michie 1932); S.C. Code § 8211(*i*) (Jacobs Press 1942). Despite being renumbered, the procedures for adjusting public utility rates remained substantively unchanged from 1922's Act No. 525.

- **Notice Provision Set Out in 1952 Statutory Renumbering**

By 1952, the notice statutes had been differentiated according to the type of utility involved. When the 1952 Code of Laws was published, the provisions of 1922's Act No. 525—though substantively unchanged with respect to water and sewer rates—were split into multiple code sections. In particular, the process for changing these rates was placed in Code Section 58-114, which still provided that a new rate schedule was presumptively valid if filed at least thirty days prior to its effective date. S.C. Code § 58-114 (Michie 1952). Likewise, a public utility could still activate a challenged rate schedule by posting a bond while an appeal was pending. *Id.* § 58-115. The notice provision of Act No. 525 became a standalone section, but its language remained the same: "Within ten days after the filing of any new or changed schedule by a public utility the Commission shall give general notice thereof by publication." *Id.* § 58-116. This final section was renumbered as Section 58-5-260 during the 1976 statutory amendments, but no other changes were made to the notice provision or the rate-setting process at that time.

- **1983 Amendments Rewrote the Process for Changing Rates and, for the First Time, Required Public Notice, a Hearing, and an Affirmative Vote of the Commission Before New Rates Could Become Effective**

Lastly, in 1983, the General Assembly substantially revised the rate-setting process and abandoned the "presumptively valid" model set forth in 1922's Act No. 525. Under these statutory amendments, which remain in place today, rates for water and sewer customers may not be changed without first notifying the public of the proposed changes, a merits hearing being held regarding those proposed rate changes, and an affirmative vote of the Commission. *See* S.C. Code Ann. § 58-5-240(B) (Supp. 2008) ("After the schedule has been filed, the Commission shall, after notice to the public such as the Commission may prescribe, hold a public hearing concerning the lawfulness or reasonableness of the proposed changes."); *id.* § 58-5-240(C) ("The Commission shall rule and issue its order approving or disapproving the changes in full or in part within six months after the date the schedule is filed."). As a result of the 1983 statutory amendments, water and sewer customers are now provided notice of the proposed rate schedules, but the schedules do not become effective without a hearing before the PSC and the Commission's ultimate approval.

* * *

"The cardinal rule of statutory interpretation is to ascertain and effectuate the intent of the legislature" whenever possible. *Anderson v. Baptist Med. Ctr. & Palmetto Hosp. Trust Fund*, 343 S.C. 487, 495, 541 S.E.2d 526, 529 (2001). In particular, revised statutes "must be construed 'in the light of the conditions obtaining at the time of their enactment.'" *S. Bell Tel. & Tel. Co. v. S.C. Tax Comm'n*, 297 S.C. 492, 494, 377 S.E.2d 358, 360 (Ct. App. 1989) (quoting *Judson Mills v. S.C. Unemployment Comp. Comm'n*,

204 S.C. 37, 41, 28 S.E.2d 535, 537 (1944)). Based on this legislative history, it is clear that South Carolina Code § 58-5-260's notice provision was only intended to alert customers that their utility rates were subject to being changed, nothing more. In 1983, though, the legislature remedied this disconnect between utilities and customers by requiring all proposed rate changes to be subjected to a notice-and-hearing process prior to taking effect. The 1983 amendments to South Carolina Code § 58-5-240 provided customers with a check on public utility rates—namely, requiring the utility to prove to the Commission that a new rate schedule was needed and that the proposed rates were lawful and reasonable—that never before existed. In short, Section 58-5-240 gave customers, such as Respondents here, due process that did not exist under the pre-1983 model.

As a result of the current notice-and-hearing process set forth in the Code, Section 58-5-260's limited notice provision is subsumed by Section 58-5-240's comprehensive notice provisions. Section 260, therefore, cannot be understood to compel any ***additional*** notice in this case or any other, as customers are already fully apprised of the possible rate change before the PSC renders its decision. Accordingly, the Court should issue an order finding that Section 58-5-260 has been impliedly repealed by the rate-setting process established in the 1983 amendments to Title 58.

2. The PSC has never interpreted the notice provisions of South Carolina Code § 58-5-260 to be applicable when a utility increases its rates pursuant to the notice-and-hearing process.

Consistent with the statute's history described above, the PSC has ***never*** interpreted South Carolina Code § 58-5-260 as applying to rate schedules approved pursuant to South Carolina Code § 58-5-240's notice-and-hearing provisions. A review

of the Commission's orders shows that after the 1983 amendments were enacted, the agency has never had a request to issue a notice pursuant to Section 58-5-260. Nor has anyone before these Respondents ever challenged the PSC's understanding or implementation of the law. In fact, the PSC's order approving Avondale's rate change here stated that Avondale had "complied with ***all*** notice requirements." (PSC Order 2009-394, p. 2 (emphasis added).) The PSC's conclusion that no additional notice is necessary should be afforded great deference.

This Court has repeatedly held that "[w]here an administrative agency has consistently applied a statute in a particular manner, its construction should not be overturned absent cogent reasons." *Gilstrap v. S.C. Budget & Control Bd.*, 310 S.C. 210, 215, 423 S.E.2d 101, 104 (1992); *see also Stuckey v. State Budget & Cont. Bd.*, 339 S.C. 397, 401, 529 S.E.2d 706, 708 (2000) (reminding that courts "give great deference to the government agency's consistent application of the statute"); *Dunton v. S.C. Bd. of Exam'rs in Optometry*, 291 S.C. 221, 223, 353 S.E.2d 132, 133 (1987) ("The construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons."). This is particularly true when the General Assembly has acquiesced to the agency's construction of a statute. *See Stone Mfg. Co. v. S.C. Employment Sec. Comm'n,* 219 S.C. 239, 249, 64 S.E.2d 644, 648 (1951) (stating "the construction of a statute by the officials charged with its administration, which has been acquiesced in by the Legislature for a long period of time, should be given great weight"); *Etiwan Fertilizer Co. v. S.C. Tax Comm'n*, 217 S.C. 354, 359, 60 S.E.2d 682, 684 (1950) (holding "where construction of the statute has been uniform for many years in administrative practice, and has been

acquiesced in by the General Assembly for a long period of time, such construction is entitled to weight").

As discussed above, since the 1983 statutory amendments, the PSC has consistently interpreted Section 58-5-260 as being inapplicable to situations where a rate is changed after the public has been given notice of the proposed change, a public hearing has been held, and the Commission has approved of a new rate schedule. In the 26 years since those changes took effect, the General Assembly has never indicated that it disagrees with the PSC's understanding of the law, nor has any customer or utility ever disputed this interpretation. No legitimate basis exists to suddenly require the PSC to issue duplicative notices. Accordingly, the circuit court's ruling on this issue should be reversed.

C. Even if Section 58-5-260 survived the 1983 amendments to the rate-setting process, Avondale's approved rate schedule should be affirmed.

1. The circuit court misconstrued Section 58-5-260 to require notice by publication after the PSC has issued its final decision, which is contrary to the statute's plain language.

In the event that the Court finds that South Carolina Code § 58-5-260 was not impliedly repealed by the 1983 overhaul of the rate-setting process, the circuit court's ruling should still be reversed because it misstates when notice must be provided under Section 58-5-260. Respondents' complaint here was that they were not given notice of the PSC's approval of Avondale's proposed rates within ten days of that decision. The circuit court agreed and stated that, pursuant to Section 58-5-260, Respondents should have been given notice within ten days ***after*** the PSC's decision was made. (*See* Temp. Inj. Order p. 6 (stating the circuit court's belief that "the June 18, 2009 Order approving

the new change rate schedule triggered the notice requirements of S.C. Code § 58-5-260").) This reading of Section 58-5-260 is contrary to its plain language and the purpose of notice provisions in general.

This Code provision states that notice by publication must be given "[w]ithin ten days after the ***filing*** of any new or changed schedule ***by a public utility***." S.C. Code Ann. § 58-5-260 (Supp. 2008) (emphasis added). The statute's triggering event, therefore, is the filing of the proposed rates by the utility, not the PSC's ultimate approval, rejection, or modification of those rates. In this case, that date was December 23, 2008, when Avondale filed its proposed rate schedule, ***not*** June 18, 2009, when the PSC approved those rates after multiple public hearings. The circuit court's misinterpretation of Section 58-5-260 should be corrected accordingly.

2. Because Avondale's customers were notified of its proposed rate changes and given the opportunity to comment on those changes, Section 58-5-260's goal of putting the public on notice of a proposed rate change was satisfied here.

Importantly, if adopted by the Court, the PSC's argument above in Section II.C.1 about when Section 58-5-260 is triggered—although contrary to the PSC's uninterrupted, unquestioned application of the law for nearly three decades—would not render Avondale's new rate schedule deficient. This Court has consistently held that where a "statute merely governs procedure, time and method as opposed to substance . . . the transaction should not be invalidated where there was substantial compliance." *S.C. Police Officers Ret. Sys. v. Spartanburg*, 301 S.C. 188, 190, 391 S.E.2d 239, 240 (1990); *see also Gen. Battery Corp. v. Greer*, 263 S.C. 533, 543, 211 S.E.2d 659, 664 (1975) (holding where a municipality "substantially, complied with the statutory laws relative to annexation," due process was afforded); *Morgan v. Feagin*, 230 S.C. 315, 316, 95 S.E.2d

621, 622 (1956) (noting the lower court's holding, not raised on appeal, that when notice was published in the form of news rather than an official notice, the publication "was in substantial compliance with the terms of the statute"); *Truesdale v. Jones*, 224 S.C. 237, 241–42, 78 S.E.2d 274, 276 (1953) (holding substantial compliance with statute requiring commissioner of elections to give ten days' notice of annexation election was sufficient).

Because it concerns the timing of when the public is given notice of a proposed rate change, Section 58-5-260 regulates only a procedural issue. This law's goal of putting the public on notice ***before*** a proposed rate change takes effect was thoroughly accomplished here. Avondale, at the PSC's direction, mailed its customers actual notice of the putative rate change on February 2, 2009, and also published notice of this change in the *Aiken Standard.* (Temp. Inj. Order p. 2.) Additionally, the PSC held two public hearings—including a local hearing in Graniteville—prior to any rate change. Accordingly, there cannot be any legitimate dispute that Avondale's customers were made aware of the possible increase in their utility rates and were given an opportunity to voice any concerns about Avondale's proposed changes. Despite its inapplicability here, Section 58-5-260's goal of putting the public on notice of a possible rate change was substantially complied with. Thus, the PSC's order approving Avondale's new rate schedule should be left in place, and the circuit court's decision to the contrary should be reversed.

CONCLUSION

For the reasons stated herein, the Court should vacate the circuit court's ruling for lack of subject matter jurisdiction. Alternatively, the Court should reverse the circuit court's ruling that additional notice of a rate change must be provided pursuant to South Carolina Code § 58-5-260 after the PSC has approved a new rate schedule pursuant to the notice-and-hearing process set forth in South Carolina Code § 58-5-240.

Respectfully submitted,

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October 19, 2009
Columbia, South Carolina

CERTIFICATE OF SERVICE

The undersigned employee of Elliott & Elliott, P.A. does hereby certify that she has served below listed parties with a copy of the pleading to the persons indicated below by mailing a copy of same to them in the United States mail, by regular mail, with sufficient postage affixed thereto and return address clearly marked on the date indicated below:

RE:	Review of Avondale Mills, Incorporated's Rates Approved in Order No. 2009-394
DOCKET NO.:	2009-342-WS
PARTIES SERVED:	Jeffrey M. Nelson, Esquire Shealy Boland Reibold, Esquire Office of Regulatory Staff P. O. Box 11263 Columbia, SC 29211 Michael Hunt 509 Laurel Drive Graniteville, SC 29829 Joe A. Taylor 105 Laurel Drive Graniteville, SC 29829
PLEADING:	LETTER - REPLY TO INTERVENORS' REQUEST OF NOVEMBER 6, 2009

Marcia W. Walters, Legal Assistant

November 17, 2009